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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.
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09/767,685 01/24/01 KELLER

W 068754/0274

EXAMINER

QM02/0718

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ART UNIT

PAPER NUMBER

3754

DATE MAILED:

07/18/01

**Please find below and/or attached an Office communication concerning this application or proceeding.**

**Commissioner of Patents and Trademarks**

# Office Action Summary

Applicati n No.

09/767,685

Applicant(s)

KELLER ET AL.

Examiner

Kenneth Bomberg

Art Unit

3754

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136 (a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☒ Responsive to communication(s) filed on 04 June 2001.
- 2a) ☐ This action is FINAL. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 1-18 is/are pending in the application.
- 4a) Of the above claim(s) 2, 11 and 15 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1, 3-10, 12-14 and 16-18 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claims \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are objected to by the Examiner.
- 11) ☐ The proposed drawing correction filed on \_\_\_\_\_ is: a) ☐ approved b) ☐ disapproved.
- 12) ☐ The oath or declaration is objected to by the Examiner.

## Priority under 35 U.S.C. § 119

- 13) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☒ Certified copies of the priority documents have been received in Application No. 08/563,109.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgement is made of a claim for domestic priority under 35 U.S.C. § 119(e).

## Attachment(s)

- 15) ☒ Notice of References Cited (PTO-892)
- 16) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 17) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s) 2.
- 18) ☐ Interview Summary (PTO-413) Paper No(s). \_\_\_\_\_
- 19) ☐ Notice of Informal Patent Application (PTO-152)
- 20) ☐ Other:

## DETAILED ACTION

### *Election/Restrictions*

1. Applicant's election with traverse of the species of Figs. 8a, 9a in combination with the coded closure cap in Paper No. 6 is acknowledged. The traversal is on the ground(s) that there is "little or no additional burden is presented by examination of all currently pending claims". This is not found persuasive because 1) the claims are directed to independent inventions, restriction is proper pursuant to 35 U.S.C. 121, and it is not necessary to show separate status in the art or separate classification (i.e. burden) (see MPEP 8-8.01(a)), and 2) it is not accompanied by a clear admission that the restricted species are not patentable over each other.

The arguments concerning the species of Figs. 8a and 9a are persuasive and the species election requirement between these two species is withdrawn.

The requirement is still deemed proper and is therefore made FINAL.

2. Claims 2, 11, and 15<sup>1</sup> are withdrawn from further consideration pursuant to 37 CFR 1.142(b), as being drawn to a nonelected species, there being no allowable generic or linking claim. Applicant timely traversed the restriction (election) requirement in Paper No. 6.

### *Double Patenting*

3. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686

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<sup>1</sup> Claims 2, 11 and 15 were indicated as being included in the elected species but are directed to a species where the coding elements are two bayonet lugs of different widths, this manner of coding is an alternative to the disclosed coding of Figs. 8a and 9a where the coding depends upon the inlet and outlet shapes or sizes.

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F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

4. Claims 1, 2-10, 12-14, and 16-18 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-7 of KELLER et al. U.S. Patent No. 6,186,363 in view of KELLER (5,137,182). KELLER et al. '363 claims substantially the same device of Applicant's current claims except for the inclusion of a closure cap. KELLER '182 teaches the use of a closure cap in order to seal the device when not being used. It would have been obvious to one having ordinary skill in the art to have modified KELLER et al. '363 to have included the sealing cap of KELLER '182 in order to seal the device when not being used as taught by KELLER '182.

#### ***Claim Rejections - 35 USC § 112***

5. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

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6. Claim 7 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

In Reference to Claim 7

The claim is not understood, the structure of the mixer having a first closure element is not understood, it appears that it is the same structure as the closure member. It is also not clear what constitutes the second closure element.

NOTE AS CLAIM 7 WAS NOT UNDERSTOOD IN VIEW OF THE NUMEROUS 35 U.S.C. § 112, ERRORS NOTED ABOVE, IT HAS NOT BEEN FURTHER TREATED ON MERITS. THE LACK OF A REJECTION BASED UPON PRIOR ART SHOULD NOT BE TAKEN AS AN INDICATION OF ALLOWABLE SUBJECT MATTER.

*Claim Rejections - 35 USC § 102*

7. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

8. Claims 1 and 4-6 are rejected under 35 U.S.C. 102(b) as being anticipated by KELLER (5,137,182).

In Fig. 7, column 3, lines 11-16, and column 4, lines 57-68, KELLER teaches of cartridge (10) for a mixer having a bayonet coupling (7) and a closure member (20b). KELLER

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explicitly teaches "the cylinders 2, the dispensing canals 4, and the cross-sections of the matching stoppers 14 may be identical or different". Clearly if the cross-sections of the dispensing canals (4), and the cross-sections of the matching stoppers (14) of the cartridge are different as explicitly taught, the coding elements for coded introduction being dissimilarly sized, shaped, and visually different inherently follow.

***Claim Rejections - 35 USC § 103***

9. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

10. Claims 8-10, 12-14, and 16-18 are rejected under 35 U.S.C. 103(a) as being unpatentable over KELLER (5,137,182).

KELLER '182 teaches of a device substantially according to the claims but does not explicitly teach of the associated mixer for mating with the cartridge. The examiner takes notice that dual cartridge containers as disclosed by KELLER '182 are customarily associated with related mixers as claimed in order to mix and dispense the material therein. Clearly such a mixer would be configured to mate with the bayonet and outlets of the cartridge. It would have been obvious to one having ordinary skill in the art at the time of the invention to have included an associated mixer with the cartridge of KELLER in order to mix and dispense the material therein as is customary in the art.

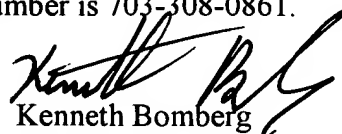
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*Conclusion*

11. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Kenneth Bomberg whose telephone number is 703-308-2179. The examiner can normally be reached on Monday-Thursday from 8:30 AM - 6:00 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Kevin P. Shaver can be reached on 703-308-2582. The fax phone numbers for the organization where this application or proceeding is assigned are 703-308-7766 for regular communications and 703-308-7766 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-308-0861.

  
Kenneth Bomberg  
Primary Examiner  
Art Unit 3754

K.B.  
July 16, 2001

Attachment for PTO-948 (Rev. 03/01, or earlier)  
6/18/01

The below text replaces the pre-printed text under the heading, "Information on How to Effect Drawing Changes," on the back of the PTO-948 (Rev. 03/01, or earlier) form.

**INFORMATION ON HOW TO EFFECT DRAWING CHANGES**

**1. Correction of Informalities -- 37 CFR 1.85**

New corrected drawings must be filed with the changes incorporated therein. Identifying indicia, if provided, should include the title of the invention, inventor's name, and application number, or docket number (if any) if an application number has not been assigned to the application. If this information is provided, it must be placed on the front of each sheet and centered within the top margin. If corrected drawings are required in a Notice of Allowability (PTOL-37), the new drawings **MUST** be filed within the **THREE MONTH** shortened statutory period set for reply in the Notice of Allowability. Extensions of time may NOT be obtained under the provisions of 37 CFR 1.136(a) or (b) for filing the corrected drawings after the mailing of a Notice of Allowability. The drawings should be filed as a separate paper with a transmittal letter addressed to the Official Draftsperson.

**2. Corrections other than Informalities Noted by Draftsperson on form PTO-948.**

All changes to the drawings, other than informalities noted by the Draftsperson, **MUST** be made in the same manner as above except that, normally, a highlighted (preferably red ink) sketch of the changes to be incorporated into the new drawings **MUST** be approved by the examiner before the application will be allowed. No changes will be permitted to be made, other than correction of informalities, unless the examiner has approved the proposed changes.

**Timing of Corrections**

Applicant is required to submit the drawing corrections within the time period set in the attached Office communication. See 37 CFR 1.85(a).

Failure to take corrective action within the set period will result in **ABANDONMENT** of the application.